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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 372 Misc.

ABRAHAM THOMAS, PETITIONER

v.

COLONEL JAMES W. DAVIS, COMMANDANT, UNITED STATES DISCIPLINARY BARRACKS, FORT LEAVENWORTH, KANSAS

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

The opinion (C. A. 3–9) [1] of the Court of Appeals has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on October 29, 1957 (C. A. 12). A petition for rehear-

[1] The transcript made at the District Court hearing is referred to as "R.". The original court-martial record, which was Respondent's Exhibit C below, is referred to as "C. M.". The pleadings filed in the District Court, which are bound separately, are referred to as "P.". The Court of Appeals proceedings, also separately bound, are referred to as "C. A.".

ing was denied on November 14, 1957 (C. A. 14). The petition for a writ of certiorari was filed on November 27, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether, on petition for habeas corpus alleging a violation of due process in court-martial proceedings, the court below erred in holding that petitioner was not entitled to further review of factual issues which either had not been raised or had been fully and fairly considered and found groundless in military appellate processes.

2. Whether (even apart from any question as to scope of review) petitioner's confession was properly admitted in evidence.

STATUTE INVOLVED

Article 31, Uniform Code of Military Justice, 10 U. S. C. (Supp. IV) 831, provides:

> (a) No person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.
>
> (b) No person subject to this chapter may interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

(c) No person subject to this chapter may compel any person to make a statement or produce evidence before any military tribunal if the statement or evidence is not material to the issue and may tend to degrade him.

(d) No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial.

STATEMENT

Petitioner, a soldier stationed in Germany, was convicted by general court-martial of the premeditated murder of four persons and was sentenced to death (C. M. 501, 508). After review, the convening authority approved the findings and sentence. On appeal, after full hearings, the findings and sentence were affirmed by the board of review (Res. Ex. D.) and the Court of Military Appeals (6 U. S. C. M. A. 92, 19 CMR 218).[2]

Subsequent to petitioner's transfer to the United States Disciplinary Barracks, Fort Leavenworth, Kansas, pending execution of the sentence, he filed a petition for a writ of habeas corpus in the United States District Court for the District of Kansas, attacking *inter alia* the admissibility of his confession (P. 3). The District Court, after hearing, discharged the writ

[2] On February 5, 1957, the President approved the death sentence and directed that it be executed.

without opinion and dismissed the petition (P. 9). The Court of Appeals affirmed.[1]

The evidence presented at the court-martial may be summarized as follows:

1. Petitioner was friendly with Walburga (also known as Elizabeth (C. M. 60, 106)) Wenderoth, who resided in Gersthofen, Germany. They had an altercation on February 5, 1954, which led to the summoning of civilian and military police (C. M. 56–57). Petitioner was searched at that time, a knife was found, and he was taken to the military police station (C. M. 57–58). After having been advised of his rights under Article 31 of the Uniform Code of Military Justice (10 U. S. C. (Supp. IV) 831) to decline to incriminate himself and to refuse to make any statement (C. M. 58), petitioner voluntarily (C. M. 58–59, 64) told one of the military policemen that he was jealous of Elizabeth's "running around with other men" and had had a fight with her (C. M. 67). A delinquency report was filed against petitioner and he was released (C. M. 70).

Petitioner's unit was in the field (on maneuvers) from February 8 to February 20, 1954 (C. M. 81–82). Upon his return he had his carbine but did not turn it in to the arms room at that time (C. M. 82–83). At about 10:00 p. m. on February 22, petitioner went to Corporal Robert Smith, the supply clerk, and asked for the key to his wall locker, al-

[1] The Government was recently informed that petitioner has suffered a subarachnoid hemorrhage and is now partially paralyzed. On December 26, 1957, he was transferred to Fitzsimons Army Hospital, Denver, Colorado.

though petitioner was supposed to have a key of his own (C. M. 92, 98). The locker key was on a ring with, among others, the key to the ammunition room (C. M. 92). Smith detached the locker key and gave it to petitioner (C. M. 92). Petitioner later that evening went to Sergeant Glendown, the supply sergeant, and repeated his request (C. M. 97). Glendown, who in the meantime had gotten the key ring from Smith, gave the whole ring to the petitioner (C. M. 98). At about 7:00 a. m. the following morning, February 23, petitioner turned in his carbine, saying that it was dirty and that he would clean it later (C. M. 83). About two hours later petitioner came back to the arms room and cleaned his weapon (C. M. 84).

On the afternoon of February 22, Sergeant Theodore Bryant dropped off his friend, Corporal Peters, at the home of Elizabeth Wenderoth and Miss Anna Weigel (C. M. 57, 105–106, 108). When Peters failed to return by 10:00 a. m. on the following day, Bryant returned to the house to look for him (C. M. 108–109). Bryant found four dead persons in the house: Peters, Sergeant Lafayette Bennett, Elizabeth Wenderoth, and Anna Weigel (C. M. 105, 109–114, C. M. Pros. Ex. 1, 7–9, 11–13A (admitted at C. M. 132–137, 163)). All had died almost instantaneously as the result of gunshot wounds. In the opinion of the medical examiner, the wounds were inflicted between 9:00 p. m. on February 22 and 1:00 a. m. on February 23 (C. M. 139–148). In particular, Corporal Peters had been shot or pickaxed some twenty times (C. M. 142, 144, 149). There was a hole the size of a man's fist in the back of Elizabeth's head (C. M. 145).

Both military and civilian police were called to the scene (C. M. 165, 201). A search of the premises uncovered a number of expended bullets and used cartridge cases (C. M. 166–168, 202–205, 226–228, C. M. Pros. Ex. 13A). In addition, the investigators, Sergeants Stanton and Boatner, learned of petitioner's earlier relationship with and assault on Elizabeth at that time (C. M. 204, 236, 248). Accordingly, the military police were asked to apprehend petitioner and obtain the carbine assigned to him from his unit (C. M. 204, 249).

Petitioner was apprehended at about 3:00 p. m. on February 23, 1954 (C. M. 249). He was taken to the Army Hospital in Augsburg, Germany, where paraffin molds of his hands and wrists were made (C. M. 205). At about 5:30 p. m., the molds, petitioner's carbine, and the bullets and cartridge cases found at the scene were sent off to the laboratory (C. M. 79–82, 205, 250, 251, C. M. Pros. Ex. 5, 6).

Sergeants Stanton and Boatner next saw petitioner after he had had dinner at about 9:00 p. m. on February 23 (C. M. 206–207). They informed him that he was suspected of the offense of murder (C. M. 207). Boatner read and explained Article 31 of the Code to petitioner (C. M. 251), and Stanton repeated the explanation in the following manner (C. M. 207):

> I explained first he need not answer any questions that might tend to incriminate him or that would in fact incriminate him or degrade him, that concerning the offense of which he was accused or suspected, he need not make any statement at all or answer any questions at all, and

that any statement that he did make could be used against him as evidence and used in a trial by court-martial.

The investigators explained to petitioner that they knew about his past relationship with Elizabeth, about his previously assaulting her, and about his extreme jealousy of her. They told him they expected the paraffin molds to show traces of nitrates, spoke of the inference that could follow such a finding,[4] and informed him they believed tests would show that petitioner's weapon had been used to fire the slugs and casings found at the scene. Petitioner was questioned at length concerning his family background and past life, both civilian and military (C. M. 208). After some questioning regarding petitioner's activities during the weekend beginning February 20, the interrogation was terminated at about 11:30 p. m. and petitioner was placed overnight in a detention cell at the Military Police Station in Augsburg, Germany (C. M. 207, 209–210).[5]

Stanton and Boatner next saw petitioner at about 1:00 p. m. on the following day, February 24. Peti-

[4] Nitrates are among the combustion products of gunpowder. The presence of nitrates on the hands of a person does not necessarily mean that the person has discharged a firearm recently, but only that firearm discharge is a possible source (C. M. 324).

[5] Although Stanton did not know it at the time, the cell had no mattress or blankets but was heated (C. M. 210). As a matter of local policy, none of the detention cells had mattresses or blankets because prisoners in the past had "burned them, torn them up and used them as a means to commit suicide" (C. M. 255). However, petitioner was not given a mattress or blankets through oversight, not design (C. M. 282).

tioner said that he had eaten both breakfast and the noon meal. He was again informed of his rights under Article 31 (C. M. 210, 255). Petitioner was told of the laboratory report* and he was questioned for about two hours (C. M. 211). A trip to the scene was undertaken and petitioner was returned to his cell at about 4:30 p. m. (C. M. 212). That evening, Stanton and Boatner talked to petitioner for about 1½ hours, ending at 9:00 p. m. (C. M. 213). They reminded him of the suspected offenses, read and explained Article 31 once again, and asked petitioner if he would consent to a polygraph examination. Petitioner agreed and was returned to the detention cell (C. M. 213).

The following morning, after breakfast, Stanton, Boatner, petitioner, and a Sergeant Myers drove to Munich, Germany, for the polygraph test (C. M. 214). The rest of the day, February 25, until 4:00 p. m. was taken up with an hour's wait for the polygraph operator, Chief Warrant Officer Fox, an hour and one half break for lunch, and the examination itself (C. M. 214, 217, 347–351). Fox advised petitioner of his rights under Article 31 at the beginning of the examination (C. M. 347–348). He did not threaten petitioner in any way and made no promise to him (C. M. 350–351). Stanton and Boatner then took petitioner to the office of Chief Warrant Officer Joseph C. O'Brien, operations officer for the 13th

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*Ballistics evidence was offered to show that petitioner's carbine had been used to fire the bullets and casings found at the scene (C. M. 299–301).

Military Police Criminal Investigation Detachment (Stanton's unit), and left him there (C. M. 214, 218, 352–353). Petitioner had mentioned that he had a headache and asked to see a doctor, but none was available at the time (C. M. 277–278).[1]

Mr. O'Brien and Sergeant McGreevey again read and explained Article 31 to petitioner, and O'Brien then questioned petitioner about his prior life, leading up to the night of February 22, 1954 (C. M. 353–354). At about 7:00 p. m., petitioner, O'Brien, and several others went over to the local snack bar where they had dinner (C. M. 356). On the way back to the office, petitioner told O'Brien he wanted to tell him something and agreed to tell his story that evening (C. M. 357).

Thereafter, having been reminded of Article 31, petitioner, in the presence of four witnesses, told of his activities on the night of February 22–23 (C. M. 357–358, 370–371). It appears petitioner had gone to Elizabeth's house at about 6:00 p. m. on February 22 and found her there alone with Anna. After he had been there for about thirty minutes, Peters and Bennett appeared. A battle soon started, and Peters and Bennett pushed petitioner out of the house. He reentered to continue the fight, but all four of the occupants joined in ejecting him from the house and yard. After promising to return, petitioner went back to his barracks, obtained the key to the ammunition room through the ruse described *supra*, pp. 4–5, and took a

[1] The dispensary was closed because of a funeral.

supply of ammunition. Petitioner brooded over his mistreatment until sometime after 10:00 p. m., then took his carbine and the ammunition, and walked back to Elizabeth s house. Arriving there after midnight, petitioner found the door open and entered. He came upon Elizabeth and Peters in bed. She said something, and petitioner shot both of them. According to petitioner, as he attempted to leave, first Bennett and then Anna Weigel attempted to disarm and stop him, thereby committing "suicide", for he promptly shot them too. Petitioner returned to his unit in time to stand reveille in the morning (C. M. 370-372).

Stanton and Boatner returned to the office in time to hear petitioner tell O'Brien that "he wasn't mad at anyone", had no hard feelings, and had been well treated (C. M. 219). The investigators took petitioner back to the police station in Augsburg, arriving there about 9:45 p. m. Petitioner asked for a mattress and blankets; these items were obtained from the bunk of the night duty investigator and given to him (C. M. 220).

Petitioner was next questioned after breakfast the following morning. He was advised of his rights under Article 31 and made an oral statement to Stanton and Boatner. Although petitioner did not know it, the investigators had secreted a microphone in the room to record the statement (C. M. 221–222). However, the recording was unsatisfactory. Stanton then placed the microphone on the table in front of petitioner and asked him to repeat the statement. Petitioner consented to do so, with better success the sec-

ond time (C. M. 223; C. M. Pros. Ex. 23, 24, 24A). This statement began with an explanation of petitioner's rights, and was essentially a repetition of the earlier statement to O'Brien (C. M. Pros. Ex. 23).

2. Mr. O'Brien made no promise to petitioner before obtaining his statement and did not threaten him in any way (C. M. 358). Petitioner did not ask to see a doctor while with Mr. O'Brien (C. M. 360). He made no complaints concerning his sleeping accommodations and the food he was receiving (C. M. 364). Petitioner did not strike O'Brien as a person of particularly low mentality (C. M. 362), although petitioner was due for early discharge because of that reason (C. M. 312). He was able to define self-incrimination for O'Brien as meaning that "anything he did say could be used against him [in court] and that he did not have to say anything" and knew the meaning of "degrade" (C. M. 361, 379). O'Brien had told petitioner of the seriousness of the offense and of the likelihood of court-martial (C. M. 363). The pretrial statement made to O'Brien was very elaborate—even dramatic—and coherent. Petitioner did not seem to lack for words or an explanation for his actions (C. M. 379).

Sergeants Stanton and Boatner made no promises to petitioner and did not threaten him (C. M. 242, 267). They felt that petitioner was uneducated, having completed only the third grade, but not stupid (C. M. 230, 231, 242).

3. During the course of court-martial, the tape recording of one of petitioner's pretrial statements was

introduced in evidence (C. M. Pros. Ex. 24A) and played for the benefit of the court-martial members (C. M. 398). In addition, a typewritten transcription of the recording was admitted in evidence (C. M. 385, C. M. Pros. Ex. 23). During closing argument, trial counsel referred to this recording and its transcript, saying (C. M. 460, 480):

> * * * And if you remember the fact that the transcript of that recording was introduced in evidence first, and if you compared that transcript with that recording you had very little difficulty in understanding the recording. You heard in Thomas' own words, as he related, how he killed these people; these four people.
>
> * * * * *
>
> * * * Words weren't put into his mouth; nobody tried to get Thomas to really hang himself and admit that he went down there with the intent to kill all four people or anything like that. It took the chips as they fell—they were recorded word for word, so you have Thomas' own statement as to what happened; nobody wrote it for him. It was written in one person's mind and that was in Thomas' mind. And when he told the truth he related it as it happened as to the best that he could remember it after it happened, as in any event.

4. At the hearing on his petition for a writ of habeas corpus, petitioner testified, although he had not done so at trial (R. 50; C. M. 367, 411). He admitted that he had fought with Elizabeth on February 5, 195- (R. 16), but denied the killings (R. 49–50). He claimed that Stanton and Boatner had not advised him

of his rights under Article 31 until the second day of interrogation (R. 26, 28, 30). He also testified that he had been physically abused and threatened by O'Brien (R. 35–38) and that his pretrial statements had been concocted by O'Brien and Boatner (R. 37, 40). In substance, petitioner testified that he had never voluntarily made a pretrial statement (R. 48).

ARGUMENT

1. Petitioner apparently assumes (Pet. 11–18) that he is entitled to have the civil courts examine *de novo*, on habeas corpus, his claim of denial of due process in the court-martial proceedings, even though the claim is essentially factual in nature and was exhaustively and fairly considered at the several appellate stages of the military system. This Court, however, held in *Burns* v. *Wilson*, 346 U. S. 137, 142, that in these circumstances it is not the function of the civil courts to repeat the reviewing process, reexamining and reweighing each item of evidence tending to prove or disprove one of the allegations in the habeas corpus application. See also *Hiatt* v. *Brown*, 339 U. S. 103; *Dickenson* v. *Davis*, 245 F. 2d 317 (C. A. 10); *Dixon* v. *United States*, 237 F. 2d 509 (C. A. 10); *Day* v. *Davis*, 235 F. 2d 379 (C. A. 10), certiorari denied, 352 U. S. 881; *Suttles* v. *Davis*, 215 F. 2d 760 (C. A. 10), certiorari denied, 348 U. S. 903; and *Easley* v. *Hunter*, 209 F. 2d 483, 487 (C. A. 10). Cf. *Brown* v. *Allen*, 344 U. S. 443, 459 (involving the related problem as to state court convictions).

In the instant case, the Court of Appeals found that the voluntariness of petitioner's tape-recorded

confession "was fully, fairly and extensively considered during the court-martial trial, and at each stage of the military court appeal system," (C. A. 5), including review by the civilian Court of Military Appeals. There is accordingly no occasion for further review by this Court.

2. Moreover, as shown hereafter, the facts do not raise issues which would afford a basis for collateral attack even on a judgment of conviction by a federal court.

a. Petitioner was advised, not once but half a dozen times, that he was suspected of murder and that he need not say anything incriminating.* As the statute requires (10 U. S. C. (Supp. IV) 831), the warning went further, for he was told that he need not say anything at all about the matter. Moreover, he was told that anything he might say could be used against him in case of trial.

No promises were made to petitioner and he was not the victim of coercion or duress. He was fed regularly, at the regular meal-time hours. When he expressed dissatisfaction with the lack of variety in his breakfasts, they were changed. A mattress and blankets were not furnished to him initially, but his cell was heated, it was lighted and constructed so as not to work unnecessary hardship on him (C. M. 238–239), and he was not deprived of anything that other prisoners had. Furthermore, he was given a mattress and blankets when he asked for them.

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*As we have shown, *supra*, p. 11, there was evidence that petitioner understood the words used.

Petitioner was not subjected to lengthy interrogation at unusual hours of the night. Compare *Watts* v. *Indiana*, 338 U. S. 49, 52–53; *Turner* v. *Pennsylvania*, 338 U. S. 62, 63–64; *Harris* v. *South Carolina*, 338 U. S. 68, 69–70; and *Haley* v. *Ohio*, 332 U. S. 596, 604. He was questioned for 2½ hours on February 23, and was in the company of the investigators for about three hours on the afternoon of the 24th. After a three-hour respite, he was interrogated for about 1½ hours that evening until 9:00 p. m. Petitioner was with the investigators the whole of the following day, February 25, from about 8:00 a. m. to 10:00 p. m.* However, the day was broken up with travel, tests, and rest periods as well as questioning periods. On February 26, he was with Sergeants Stanton and Boatner just long enough to make a successful recording of his statement.

In the petition (Pet. 2, 4, 8, 9), much is made of petitioner's relatively low mentality and his limited education. However, petitioner had passed seventh grade tests while in the service (R. 14–15); and his intelligence was not so limited that he could not understand the warnings given him and could not give a responsible voluntary statement. On all the facts, there was ample basis for the factfinders to conclude that petitioner's statements were voluntarily given. See *Lyons* v. *Oklahoma*, 322 U. S. 596.

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*Although petitioner said that he had a headache on February 25 and asked to see a doctor, there is nothing to indicate that he was seriously incapacitated. His request was not granted because no doctors were available, not because there was any intent to coerce him (C. M. 277–278).

Proper instructions were given by the law officer on this issue (C. M. 367–369, 385, 396).

b. Petitioner's argument (Pet. 13–15) that the rule of *McNabb* v. *United States*, 318 U. S. 332, applies to court-martial proceedings was expressly rejected in *Burns* v. *Wilson*, 346 U. S. 137, 145, n. 12:

> We reject petitioners' contentions that the rule of *McNabb* v. *United States*, 318 U. S. 332 (1943), renders the confessions inadmissable and requires the civil courts to hold that the courts-martial were void. The *McNabb* rule is a rule of evidence in the federal civil courts; its source is not "due process of law," but this Court's power of supervision of the administration of criminal justice in the federal courts. See 318 U. S., at 340; cf. *Gallegos* v. *Nebraska*, 342 U. S. 55 (1951). We have of course no such supervisory power over the admissibility of evidence in courts-martial.

The *McNabb* rule is a means used to insure compliance within the federal court system with Rule 5 (a), F. R. Crim. P., which requires a preliminary hearing "without unnecessary delay" for arrested persons. See *Mallory* v. *United States*, 354 U. S. 449. Not only is Rule 5 (a) inapplicable to court-martial proceedings, but also no process analogous to preliminary hearing has been provided by Congress in military law. Article 32 of the Uniform Code of Military Justice (10 U. S. C. (Supp. IV) 832) provides for an "investigation" somewhat akin to an in-

quest or open grand jury proceeding." The function of this "investigation" is quite different from the preliminary hearing required in the civil courts. In addition, the "investigating officer" is specially appointed in each case (Manual for Courts-Martial, United States, 1951, par. 33 (e), p. 40) and hence, unlike the situation in the civil courts, there is no continuing body before whom a military prisoner could be brought "without unnecessary delay" after arrest.

On the other hand, one of the principal purposes of the preliminary hearing procedure in the civil courts—to inform the prisoner of his privilege against self-incrimination—is accomplished through Article 31 (b) (10 U. S. C. (Supp. IV) 831), which requires that the prisoner be so informed by the arresting officers and others. In the instant case, as already pointed out, petitioner was repeatedly advised of his right to remain silent.

c. Petitioner also contends that the admission of the tape recording of his oral confession and trial counsel's comments regarding the recording amounted to requiring him to testify against himself, even though he elected not to take the stand (Pet. 16–17).

The Fifth Amendment does not bar the admission of a pretrial confession unless it is involuntary. *Wilson* v. *United States,* 162 U. S. 613, 623. Confessions which are otherwise admissible do not become

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[10] Article 32 provides in part: "This investigation shall include inquiry as to the truth of the matter set forth in the charges, consideration of the form of charges, and a recommendation as to the disposition which should be made of the case in the interest of justice and discipline."

less so because they are oral, or written, or part oral and part written. *Thomas* v. *United States,* 15 F. 2d 958, 960 (C. A. 8). Similarly, once the authenticity of a tape recording of a relevant oral pretrial statement is shown, as it was here, the form in which the statement is reproduced in court does not render it excludable. Such evidence is not compulsory testimony by the petitioner. See *Burgman* v. *United States,* 188 F. 2d 637, 639–640 (C. A. D. C.); *Gillars* v. *United States,* 182 F. 2d 962, 973 (C. A. D. C.); *People* v. *Sica,* 112 Cal. App. 2d 574, 247 P. 2d 72, where statements during the course of a conspiracy were secretly recorded; *People* v. *Porter,* 105 Cal. App. 2d 324, 233 P. 2d 102, where the fabrication of a "story" by two defendants was secretly recorded; and *People* v. *Hayes,* 21 Cal. App. 2d 320, 71 P. 2d 321, where a sound motion picture of the giving of the confession was made.

The sole issue is what the defendant said while talking to the interrogator, not the manner in which the statement was preserved, whether (*e. g.*) through the memory of another who heard the statement, by recording, or by reduction to writing. *United States* v. *White,* 223 F. 2d 674 (C. A. 2), certiorari denied, 350 U. S. 888. Hence the tape recording was admissible in either auditory or transcript form, or both. *People* v. *Feld,* 305 N. Y. 322, 113 N. E. 2d 440.[11]

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[11] Petitioner now contends his oral statement was secretly recorded. There was evidence to dispute this at the court-martial trial (*supra,* pp. 10–11), but the recording would nevertheless be admissible even if obtained in secret. *On Lee* v. *United States,* 343 U. S. 747.

Military law prohibits comment upon the failure of an accused person to take the stand, but trial counsel is entitled to make fair comment on the evidence actually adduced. Manual for Courts-Martial, United States, 1951, par. 72 *b*, p. 111. He did nothing more than that here. The tape recording of the confession was properly in evidence, it was of the voice of petitioner, and counsel confined his remarks to the recording. He discussed its worth as evidence, just as he might with respect to a fingerprint. See *Hunt* v. *United States*, 231 F. 2d 784, 785 (C. A. 8). He did not extol the advantage of taking the stand as a witness, or suggest that petitioner personally should have rebutted the truthfulness of the confession. Cf *Wilson* v. *United States*, 149 U. S. 60, 66, and *Baker* v. *United States*, 115 F. 2d 533, 544 (C. A. 8), certiorari denied, 312 U. S. 692.

Moreover, petitioner's counsel failed to object to the prosecutor's statement when it was made and when any error could easily have been corrected. Therefore, he waived any objection he might have had. See *Johnson* v. *United States*, 318 U. S. 189, 199–201. In fact, the question was not raised at any stage of the military proceedings, even on appeal.[13]

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[13] It was first mentioned at the District Court hearing on the petition for habeas corpus (R. 71–73).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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